Supreme Court, U.S.
FILED
OCT 7 1994
OFFICE OF THE CLERK

No. 94-443

In The

Supreme Court of the United States

October Term, 1994

MODERN GRAPHIC ARTS, INC.,
a Florida Corporation, and
TIMES PUBLISHING COMPANY, a Florida
Corporation d/b/a ST. PETERSBURG TIMES,

Petitioners,

vs.

WILLIAM C. BEDINGHAUS, ROBERT D. BACON,
BARBARA J. ORR, Individually and as
Class Representatives,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

LEONARD POE
(Counsel of Record)
P.O. Box 5
Burnsville, NC 28714
(704) 682-9609

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

The Respondents submit that the questions presented for review can be simplified as follows.

1. With regard to the interpretation of severance pay policies in connection with the sale of ongoing businesses, does this case conflict with other circuits?

2. If there is such a conflict among the circuits, can it be resolved by this Court's interpretation of the severance pay policy applicable to this case?

3. Did the Circuit Court's determination that the severance policy in this case was not ambiguous, and thus did not require resort to the Petitioners' extrinsic evidence to determine intent, conflict with this Court's ruling in *Firestone Tire & Rubber Co. v. Bruch*?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

RESPONDENTS' BRIEF IN OPPOSITION 1

I – MISSTATEMENTS OF LAW AND FACT 1

II – REASONS FOR DENYING THE PETITION 3

A – NO CONFLICT AMONG THE CIRCUITS 3

B – NO CONFLICT WITH *FIRESTONE v. BRUCH* 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Accardi v. Control Data Corp., 836 F.2d 126 (2nd Cir. 1987) 8, 9

Adcock v. Firestone Tire and Rubber Co., 822 F.2d 623 (6th Cir. 1987) 8

Alley v. Resolution Trust Corp., 984 F.2d 1201 (D.C. Cir. 1993) 10

Bradwell v. GAF Corporation, 954 F.2d 798 (2nd Cir. 1992) 7

Firestone Tire And Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) 11, 12

Fuller v. FMC Corp., 4 F.3d 255 (4th Cir. 1993) 7

Harper v. R.H. Macy & Co., Inc., 920 F.2d 544 (8th Cir. 1990) 7

Headrick v. Rockwell International Corporation, 24 F.3d 1272 (10th Cir. 1994) 7

Holland v. Burlington Indus., Inc., 772 F.2d 1140 (4th Cir. 1985) 8

Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985) 6, 7

Lakey v. Remington Arms Co., Inc., 874 F.2d 541 (8th Cir, 1989) 7

Rowe v. Allied Chemical Hourly Employees Pension Plan, 915 F.2d 266 (6th Cir. 1990) 7

Schroeder v. Phillips Petroleum Company, 17 F.3d 1147 (8th Cir. 1994) 7

Schwartz v. Newsweek, Inc., 827 F.2d 879 (2nd Cir. 1987) 9

TABLE OF AUTHORITIES – Continued

Page

Sejman v. Warner-Lambert Co., Inc., 889 F.2d 1346 (4th Cir. 1989) 7, 8

Sly v. P.R. Mallory & Co., 712 F.2d 1209 (7th Cir. 1983) 8

STATUTES AND REGULATIONS

29 U.S.C. § 1002(1)(A) 2

29 U.S.C. § 1002(1)(B) 3

29 U.S.C. § 186(c)(6) 3

29 C.F.R. § 2510.3-1(a)(3) (1989) 3

No. 94-443

In The

Supreme Court of the United States

October Term, 1994

MODERN GRAPHIC ARTS, INC.,
a Florida Corporation, and
TIMES PUBLISHING COMPANY, a Florida
Corporation d/b/a ST. PETERSBURG TIMES,

Petitioners,

vs.

WILLIAM C. BEDINGHAUS, ROBERT D. BACON,
BARBARA J. ORR, Individually and as
Class Representatives,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents hereby oppose the Petition For A Writ Of Certiorari.

I. MISSTATEMENTS OF LAW AND FACT

The Petitioners have made several misstatements of the facts and the law. Petitioners state several times that the employees had a virtually identical benefit package after the sale. In fact, the purchasing corporation did not

have the same level of benefits, and did not carry over the years of service accrued by the employees for purposes of calculating severance pay. This fact was of record and noted by the Circuit Court in its opinion. (See Petitioners' Appendix-at pages 4 and 8).

The Petitioners suggest on page 7 of their Petition that the plaintiffs conceded in their depositions that the term "discharge" did not describe their transfer of employment to the successor corporation. This is a mischaracterization of the testimony of the class representatives. For example, an excerpt from the deposition of class representative Barbara Orr contained in the record on appeal records her understanding of the term "discharge" as follows: "I take that as meaning that you no longer work for the same employer, not that you don't have a job." This is directly contrary to the Petitioners' characterization of her testimony.

On page 9 of the Petition it is stated that no evidence was presented by either party to establish that the term "staffer" was imbued with special meaning within the Times' organization. In fact the record before the Circuit Court contained a joint affidavit of the class representatives containing numerous exhibits demonstrating exactly that fact. This affidavit was not countered by the Petitioners.

And perhaps most importantly, the Petitioners misstate the law on pages 21-22 of their Petition by contending that ERISA expressly defines severance benefits only in terms of unemployment benefits under 29 U.S.C. § 1002(1)(A). Contrary to the Petitioners' contention, severance plans are not incorporated within the definition of

"employee welfare benefit plan" through subsection (A) of 29 U.S.C. § 1002(1), which uses the word "unemployment." Rather, severance plans are incorporated into the definition of "employee welfare benefit plan" through 29 U.S.C. § 1002(1)(B) which incorporates by reference "any benefit described in section 302(c) of the Labor Management Relations Act, 1947." Those benefits incorporated in ERISA by reference to the Labor Management Relations Act include "holiday, severance, or similar benefits." 29 U.S.C. § 186(c)(6). "Thus, the effect of section 3(1)(B) of the Act [29 U.S.C. § 1002(1)(B)] is to include within the definition of 'welfare plan' those plans that provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized.)" 29 C.F.R. § 2510.3-1(a)(3) (1989). Thus the concept of unemployment is completely divorced from the concept of severance pay under ERISA's definition of an employee welfare benefit plan. Yet it is precisely this notion of unemployment as a condition of severance pay that has provoked each appeal in this case.

II. REASONS FOR DENYING THE PETITION

A. NO CONFLICT AMONG THE CIRCUITS

Entitlement to severance pay upon the sale of an ongoing business is an often litigated issue. The result of each case is dictated by the specific language of the applicable severance policy. Naturally, under some policies the employers have prevailed; under others the employees have prevailed. Petitioners assert that this

dichotomy of results evidences a conflict among the federal circuits. The Petitioners' consequent plea for this Court's discretionary review should be denied for three reasons.

First, there can be no such conflict in this context because each case is, in a sense, limited to its facts, or at least to the terms of its applicable severance policy. Indeed, the Circuit Court limited this case to its facts. "Under the particular terms of the Times' and MGA's severance benefits policy, as applied to the specific facts before us, we find that plaintiffs are entitled to severance pay." (Petitioners' Appendix at page 15).

Second, the "conflicting" cases cited by the Petitioners are readily reconciled and distinguished by reference to the operative language of the various severance policies being interpreted.

And third, even if there is a conflict, this Court's review of the unique severance policy applicable to this case would do little to resolve conflicts with the variant policies that will arise in other cases.

In the sale of an ongoing business, the employment relationship with the seller is clearly terminated although the employees suffer no unemployment. Thus, entitlement to severance pay usually turns on whether the policy contemplates unemployment as a condition of severance pay.

The severance policy applicable in this case was rendered twice: once in the *Times-O-Guide* and once in the *Staffer Handbook*. The *Staffer Handbook* provided that any

conflicts would be controlled by the *Times-O-Guide*. The *Times-O-Guide* contains the following policy:

> TERMINATION
>
> Our hope is that every staffer who joins the company will stay until retirement. However, we realize this is unrealistic and there will be turnover. Such separations, whether through resignation or discharge are simpler when certain ground rules are stated and understood.
>
> 1. When you resign, you should give notice. Two weeks is customary.
>
> 2. If, after the first six months, you are discharged as a full-time staffer for reasons other than cause (see examples below), the company will pay you 1 week's pay-in-lieu of notice for each 6 months of service. This amounts to 2 weeks' pay for 1 year of service, 10 weeks' pay for 5 years of service, etc. No pay-in-lieu of notice is paid for less than six months' service, nor for fractional parts of six-month periods.

(The "examples" parenthetically referenced deal with employee misconduct constituting "cause" for dismissal, and are not relevant here).

The *Staffer Handbook* paraphrased the policy as follows:

> *IN-LIEU PAY*
>
> If terminated without cause, a staffer is entitled to one week's pay for each complete six month period of employment upon termination. Termination with cause is defined in the *Times-O-Guide*.

The operative language in the *Times-O-Guide* is "discharged as a full-time staffer." In the *Staffer Handbook* it is simply "terminated." The policy does not reveal what the underlying motivation or purpose for the policy was, and courts should resist the temptation to speculate or substitute their own opinion regarding the general nature of severance pay. Yet the District Court concluded that the "language clearly lends a reader to the conclusion that an employee would be unemployed after the 'separation' no matter how short the term of unemployment." (Petitioners' Appendix at pages 27-28). The Circuit Court reversed, noting that "the severance pay policy at issue here does not define 'discharge' or 'termination' to require unemployment." (Petitioners' Appendix at page 13). It was obvious to the Circuit Court that the employment relationship, embodied in the term "staffers", was all that needed to be terminated under this particular severance pay policy.

By contrast, the cases cited by the Petitioners as conflicting with this case turn on different policy language contemplating unemployment as a condition of severance pay entitlement. In addition, many were decided under the arbitrary and capricious standard, which afforded deference to the employers' interpretations not appropriate under the *de novo* standard applicable in this case.

The terms "laid off," "lack of work," and the like are usually interpreted as requiring unemployment. For example, in *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985), the court, applying the arbitrary and capricious standard, was construing policy language describing termination as a "lay off" and "lack of work situation." *Id.* at 712. The court noted that "the lay off provisions of the

plan appear to contemplate a situation where the employees are without further employment for at least some period of time subsequent to the lay-off." *Id.* at 713. In *Bradwell v. GAF Corporation*, 954 F.2d 798 (2nd Cir. 1992) the operative language was "laid off because of lack of work." *Id.* at 799. In *Fuller v. FMC Corp.*, 4 F.3d 255 (4th Cir. 1993) the operative language was "laid off employees and terminated employees (employees laid off due to a closing of a plant or location)." *Id.* at 257. In *Schroeder v. Phillips Petroleum Company*, 17 F.3d 1147 (8th Cir. 1994) the operative language was "laid off due to a force reduction for lack of work." *Id.* at 1148. In *Headrick v. Rockwell International Corporation*, 24 F.3d 1272 (10th Cir. 1994) the operative language was "laid off for lack of work." *Id.* at 1276. In *Rowe v. Allied Chemical Hourly Employees Pension Plan*, 915 F.2d 266 (6th Cir. 1990) (a case not involving severance pay) the court held that the employees who were transferred to the purchaser were not "laid off" as that term was used in their pension policy. In *Harper v. R.H. Macy & Co., Inc.*, 920 F.2d 544 (8th Cir. 1990), the court construed a policy granting a "[s]everance [a]llowance . . . when [an employee is] permanently terminated or laid-off for periods that exceed 90 days." *Id.* at 545. The policy in *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541 (8th Cir. 1989), decided under the arbitrary and capricious standard, conditioned entitlement to severance pay upon termination "caused by lack of work."

The policy in this case does not utilize the terms "lay off", "lack of work", or the like.

In other cases, language in the policy such as "job elimination" or "position elimination" was interpreted by the court to contemplate unemployment. In *Sejman v.*

Warner-Lambert Co., Inc., 889 F.2d 1346 (4th Cir. 1989), the operative language of the policy was "terminated by the company as a result of job elimination." *Id.* at 1347. Likewise, under the arbitrary and capricious standard, where there was no period of unemployment, there was no "job elimination" as required under the plan in *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1149 (4th Cir. 1985). In *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983), the court interpreted policy language awarding severance pay "to cover separation caused by reduction in force of position elimination." *Id.* at 1212. Together with other policy provisions, the court held that under the arbitrary and capricious standard it was reasonable for the company to conclude that the policy anticipated a period of unemployment to award severance pay. In *Adcock v. Firestone Tire and Rubber Co.*, 822 F.2d 623 (6th Cir. 1987), decided under the arbitrary and capricious standard, the policy awarded severance pay when a termination was "necessary to eliminate a position because of reduced workload or due to economic necessity." The policy's stated goal was to minimize "the economic and mental stress of terminated employees . . . between the release from Firestone and securing other employment." *Id.* at 624.

In this case severance pay is not predicated upon "job elimination" or "position elimination."

And finally, two other cases decided under the arbitrary and capricious standard are cited by the Petitioners, but are clearly distinguishable. In *Accardi v. Control Data Corp.*, 836 F.2d 126 (2nd Cir. 1987), the separation policy specifically defined three categories of separation, none of which included "the sale of a division where the

acquiring entity hires the division employees." *Id.* at 128. The court noted that under the arbitrary and capricious standard the separation policy was plausibly intended "as a discretionary unemployment benefit." *Id.* at 129. In *Schwartz v. Newsweek, Inc.*, 827 F.2d 879 (2nd Cir. 1987), decided under the arbitrary and capricious standard, the severance policy gave employees the option of transferring to the new company or searching for continued employment with the selling company. It further provided that if an employee did not wish to transfer and could not find suitable employment within the selling company, he would be entitled to severance pay. The court held that it was not arbitrary and capricious to deny severance pay to those individuals who voluntarily took employment with the purchaser. In the present case the employees were given no such option to refuse the transfer or be relocated within the Times organization.

Thus all of the Petitioners' cases can be distinguished and reconciled because the courts therein determined that policy language utilizing such terms as lay-off, lack of work, and job elimination contemplated unemployment as a condition of severance pay.

In some of the cases cited by the Petitioners, the courts indulged in speculation that severance plans are intended as unemployment benefits, and that to award severance pay when there was no unemployment would result in an unjust windfall to the employees. Such speculation is inappropriate under the *de novo* standard, and such conclusions would be wrong in this case. First, as already noted, under ERISA severance plans are not merely a species of unemployment plans. In addition, many courts have noted that while severance plans can

be intended as supplemental unemployment benefits, they can also be a reward for past services. See, e.g., *Alley v. Resolution Trust Corp.*, 984 F.2d 1201, 1205 (D.C. Cir. 1993). In any event, if, as here, the plan language does not disclose the employer's position regarding the nature of severance pay, but the plan is nevertheless unambiguous, the court is simply required to enforce the policy according to its terms. Second, although often cited, what happens to the employees after the transfer of employment is not technically relevant unless made so by the plan terms. But where, as here, the employees have indeed suffered a loss of benefits, the courts have not considered severance pay to be an unjust windfall. (Petitioners' Appendix at pages 8-9).

The severance policy in this case contains no language by which unemployment can be fairly implied as a condition of severance pay. Rather it is evident in the preamble of the TERMINATION policy and through the term "staffer" that entitlement to severance pay was predicated upon the mere termination of the employer/employee relationship without regard to unemployment. There is no conflict between this case and the others cited by Petitioners. Furthermore, because each case turns on the particular severance policy involved, no perceived conflict among the circuits can possibly be resolved by this Court's interpretation of a single severance pay policy dramatically different from the policies interpreted in the allegedly conflicting cases. The petition for certiorari should be denied.

B. CONFLICT WITH *FIRESTONE v. BRUCH*.

The parties concur that under *Firestone Tire And Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), extrinsic evidence is irrelevant if the operative language of the severance policy is unambiguous. The Petitioners, for the first time in this action, argue that the plan terms are ambiguous and thus require resort to extrinsic evidence. Until now both parties have strenuously contended that the plan terms are unambiguous. At the same time, respective counsel have zealously advocated contrary interpretations favorable to their respective clients. Opposing parties in any dispute involving the construction of a written instrument will advocate contrary interpretations. That does not *ipso facto* create an ambiguity necessitating the resort to extrinsic evidence. To hold otherwise would eviscerate the parol evidence rule, a result surely not intended by this Court in *Bruch*. The tack taken by the Petitioners is also a transparent attempt to bring factors relevant only under an arbitrary and capricious analysis into the *de novo* analysis mandated by *Bruch*.

The terms of the severance policy in this case are not internally inconsistent or otherwise ambiguous, and no resort to extrinsic evidence is necessary to discern the objective intent of the policy. The policy intended to grant severance pay to any staffer who was terminated without cause. No further inquiry into the subjective intent behind the policy is necessary or appropriate.

The Petitioners make much of the Circuit Court's refusal to seriously consider their extrinsic evidence of a "half-century of consistent interpretation and application

of the severance policy." This extrinsic evidence consists of a series of affidavits by present and former employees of the Times, all included in the record on appeal. This "half-century of consistent interpretation" amounts to a single instance in 1956 in which the Times sold the assets of its wholly owned subsidiary, Pinellas Broadcasting Company, and did not pay severance pay. No one asked for it. The severance policy was not even the same. The other three instances offered by Petitioners' extrinsic evidence are clearly distinguishable as mere corporate reorganizations in which the affected employees remained "staffers" somewhere within the Times organization or its affiliates. Such "uncontested proof" can hardly be characterized as compelling, even if considered. Convenient recollections of the original motivation behind the policy and distant examples of how the policy was applied, events that predated ERISA by almost 20 years and the sale of Modern Graphic Arts by 30 years, should not influence a court's *de novo* review of a policy in effect and applied to these employees in 1989.

The Circuit Court carefully and properly followed this Court's mandate in *Bruch*, and there is no conflict between the Circuit Court and this Court justifying intervention. Again, the Petition for Certiorari should be denied.

CONCLUSION

For the reasons stated above, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

LEONARD POE
(Counsel of Record)
P.O. Box 5
Burnsville, NC 28714
(704) 682-9609

Attorney for Respondents

October 7, 1994